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August 1, 2003

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Ms. Marlene Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: WT Docket No. 03-128 Nationwide Programmatic Agreement

Dear Ms. Dortch:

The Board of Directors of the National Conference of State Historic Preservation Officers at their July 12, 2003, meeting considered the materials the Federal Communications Commission (FCC) distributed June 9, 2003, concerning a proposed Programmatic Agreement with the Advisory Council on Historic Preservation (ACHP) and the National Conference.

The Board was disappointed that this draft, as previous versions, has omitted provisions proposed by the National Conference. The Board authorized me to inform you that the FCC and the ACHP should not assume that the National Conference will sign the June 9 document. In this letter the National Conference restates its strong concern regarding the following four issues not adequately addressed in the draft agreement, and we offer a number of comments and recommendations.

Issues not adequately addressed in the Programmatic Agreement.

1. Area of potential effect (APE): Mandatory radius for all towers, particularly for towers 1,000 feet or taller
 - a. For towers 1,000 feet or taller, the APE should be individually determined by the applicant with the concurrence of the State Historic Preservation Officer (SHPO) (See comment #19 below.)
 - b. In exclusion areas, for towers less than 1,000 feet in height, the radius for setting the APE should be 400 feet or the height of the tower, whichever is taller (See comment # 8 below)
2. Lack of notice to SHPO (although local governments are notified) when companies

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are building in exclusion zones. (See comment #10.)

- 3 Lack of an opt out provision for individual SHPOffices to identify area of known or predicted historic properties to be removed from an exclusion zone. (See comment #9)
- 4 Requirement for consultants to indicate their qualifications on the submission form. (See comment #3 Submission Form Packet.)

Finally, the document is not as clear as it could be in addressing the roles of Indians in the Section 106 process and differentiating among 101(d)(2) Tribal Historic Preservation Officers, non 101(d)(2) tribal lands where the SHPO maintains the consultative role in the Section 106 process, and sacred sites of interest to a tribe off tribal lands. Further, since the agreement does not apply to tribal lands, SHPOs will be conducting a different Section 106 process on and off tribal lands.

The National Conference acknowledges the improvements undertaken by the Federal Communications Commission to improve the Section106 process: hiring a cultural resources specialist to address historic preservation issues, supporting the necessity to have historic preservation professionals making historic preservation assessments for applicants, and instituting enforcement proceedings against applicants who had ignored Section 106 review requirements.

We look forward to discussing these points with the Wireless Bureau and the ACHP.

General comments

Statement of Chairman Michael K. Powell

- 1 FCC Environmental and Historic Preservation Action Plan–What is this plan?

Appendix A: Nationwide Programmatic Agreement

- 1 A-1 The title includes the word “Certain” before “Undertakings”–does that imply there are FCC undertakings *not* included in this agreement?
- 2 A-1--numbering the WHEREAS clauses would have made commenting easier.
3. A-3 second WHEREAS–what is the implication of the word “practicable” used to describe consultation with tribal governments?

- 4 A-3 7th WHEREAS–The National Conference appreciates including the reference to qualified professionals and in the 8th WHEREAS clause the reference to the FCC’s hiring a cultural resource professional
- 5 A-4, 1 D. Exemption tribal lands–
 - a. The exemption of tribal lands from the agreement while at the same time including references to THPOs makes the document confusing.
 - b. For tribal lands where the Secretary of the Interior has not designated a Tribal Historic Preservation Officer (THPO), the Applicant’s contact point for Section 106 is the SHPO (See top of A-5) The official designation by the Secretary is necessary to eliminate the SHPO’s 106 authority on tribal lands.
- 6 A-6 to 7 II. Definitions–the meaning of “undertaking” as it pertains to the agreement is not included. It might be helpful to have a layman’s definition in the agreement (Attachment 2 while appropriate for practitioners, is not clear to people outside the telecommunications field.)
- 7 A-8, III Exclusions 4 –This provision excludes all towers of 400 feet or less in industrial areas. The term “government-office” is confusing. Does it mean just government offices or all offices? The addition of the reference to structures 45 years or older is helpful and an improvement over earlier drafts.
- 8 A-8, III. Exclusions 4 –The use of the word “structure” (last line on page 8) should be changed to “property” to include such property types as cemeteries and historic districts that are 45 years old or older.
- 9 A-8 to 9, III. Exclusions footnote 4–The Conference believes the Ohio proposal–400 feet or a distance equal to the height of the proposed facility–merits inclusion. For towers less than 1,000 feet in height, the radius for setting the APE should be 400 feet or the height of the tower, whichever is taller.
- 10 A-9, III Exclusions footnote 5–The Conference believes the inclusion of an “opt out” provision is meritorious, particularly since the exclusionary language is so broad and may have the unintended consequences of unnecessarily, adversely impacting Historic Properties States must be allowed to consider impacts to known National Register listed or eligible properties, and based on such knowledge, must be allowed to modify exclusion areas
- 11 A-9, III. Exclusions–For exclusionary areas, applicants will provide no notice to the SHPO of tower activity. The National Conference is very concerned about this provision If the Applicant is providing notice to a local government (see Section V Public Participation and Consulting Parties, A-15) about tower construction in an exclu-

sion zone, a contemporary notice to the SHPO should not create an administrative burden. An alternative notice, could be provided through a FCC web site that indicates all prospective sites for towers with location (linked to a standard map), height, date information posted, and Applicant name.

- 12 A-9, III Exclusions 5 Area of Potential Visual Effect/Standard Radius –This exemption remains problematic to the NCSHPO. The NCSHPO wants to make sure that 106 review occurs when a proposed Facility has the potential to impact a National Register listed or eligible property within the 200' of the outer boundary of the exempted land uses. Examples include historic railroad depots and hotels, historic buildings adjacent to highways, and historic districts whose boundary is the highway.
- 13 Exclusions–The Conference does not see language in this section, or in the Agreement that provides for the future elimination of obsolete towers.
- 14 A-10, III. Exclusions B–This alternative has the effect of negating the benefits to industry of the exclusion provision. This provision is not an appropriate place to address FCC/tribal communications.
- 15 A-11, IV. Participation of Indian Tribes and Native Hawaiian Organizations–The National Conference prefers Alternative A, prepared by the Working Group
- 16 A-11, IV Tribal Participation–
 - a. Since tribal lands are excluded from this agreement, references to tribal lands may be confusing.
 - b. Where there is no THPO, the SHPO is responsible for 106 within that State.
 - c. Some provision should be included for communication by the Applicant with the SHPO whose consultation is required for determinations of eligibility, including for properties of religious or cultural significance.
 - d. It may be important to include a definition (IV. F.) of “additional time as reasonable”.
- 17 A-13, IV. Tribal Participation G.–It will be important for the Applicant to keep the SHPO informed about communications between tribes and the Commission. Except for tribal lands under the jurisdiction of a Tribal Historic Preservation Officer, the State Historic Preservation Officer remains the point of contact for Section 106 comments.
- 18 A-13, IV Tribal Participation H.–It is possible that more than one tribe may attach significance to historic properties in the same geographic location.

19. A-16, V. Public Participation and Consulting Parties F—This paragraph appears to imply a relationship between SHPOs and local governments with religious properties. Is this intended?
20. A-17, VI Identification, etc.—For towers 1,000 feet or taller, the APE should be individually determined by the applicant and the SHPO.
21. A-18, VI Identification, etc. B 2.b.—The Conference appreciates the inclusion of the capability to determine an alternative APE.
22. A-19, VI Identification, etc, D 2 —Should the Applicant and/or the SHPO be able to resolve questions about eligibility by going directly to the Keeper? Adding the Commission may unnecessarily prolong the review.
23. A-19, VI Identification, etc., E. 3 —The Conference draws the attention of SHPOs to this relationship of “effect” to “significant features.”
24. A-20 ff, VII Procedures—The Conference draws the attention of SHPOs to the adherence to the 30-day rule
25. A-20 44, VII. Procedures—The Conference raises the issue as to why only Applicants may contact the Commission if a failure to agree exists. SHPOs should have the same option.
26. A-23, VII Procedures D. 2 —Does the agreement mean to include the Council in *every* determination of adverse effect (by sending all the material to them)?
27. A-25, X Construction Prior, C 3-6 —The Commission needs to look at the language and make sure it is clear who is required to submit material and reports to whom.
28. A-27, XIV Review—Who is to call the annual meetings? I assume it would be the FCC.

Submission Form/Package for Nationwide and Collocation Agreements

1. Would it make sense to have just *one* form? Both seem to be very similar.
2. The introductory material seems unnecessarily ponderous.
3. The forms need to indicate the name and qualifications of the individual consultant who is doing the 106 work.

Attachment 2 List of FCC Activities Covered

This continues to be a document un-penetrable to non-FCC specialists. The FCC

should be able to indicate how it defines “undertaking” for this agreement in plain English.

Appendix B Regulatory Flexibility Analysis

This is a new document. What is its purpose and relationship to the programmatic agreement?

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy Sanderson" or similar, written in a cursive style.

Edward F. Sanderson, President
National Trust for Historic Preservation

cc: Board of Directors, National Conference of State Historic Preservation Officers
Charlene Vaughn, Advisory Council on Historic Preservation